IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEPKE J. WILS	:	CIVIL ACTION
	:	
v.	:	
	:	
RICHARD G. PHILLIPS and PILOT AIR FREIGHT, INC.	:	NO. 98-5752

MEMORANDUM AND ORDER

HUTTON, J. April 8, 1999

Presently before the Court are Defendants Richard Philips and Pilot Air Freight, Inc.'s Motion Under Fed. R. Civ. 12(b)(6) to Dismiss Counts I and III through X of the Complaint (Docket No. 4), Plaintiff Gepke J. Wils' response (Docket No. 5), Defendants' Brief in Reply (Docket No. 6), and Plaintiff's Sur Reply (Docket No. 7). For the reasons stated below, the Defendants' Motion is **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

The Plaintiff, Gepke Wils, alleges the following facts in her complaint. In August 1995, Defendant Pilot Air Freight, Inc. ("Pilot Air") hired Plaintiff as an executive secretary for the chief operating officer. In November 1995, Pilot Air promoted Plaintiff to Director of Human Resources. During her employment as Director of Human Resources, Plaintiff alleges that Pilot Air's President and Board Chairman, Richard Phillips, sexually harassed

her. Plaintiff alleges that she rejected Phillips' sexual advances and complained about his conduct.

Subsequently, in September 1997, Defendants removed Plaintiff from her position and assigned her to the position of International Collection Specialist. On October 3, 1998, Plaintiff filed a discrimination charge against Defendants with the Pennsylvania Human Relations Commission (PHRC) and Equal Employment Opportunity Commission (EEOC). In October 1997, Plaintiff also informed the Defendants that she filed a PHRC charge against them. In December 1997, Plaintiff received an unfavorable written evaluation.

In January 1998, Plaintiff went on short term disability leave. When Plaintiff's leave ended in July 1998, Plaintiff went on unpaid leave under the Family Medical Leave Act (FMLA). The Plaintiff alleges that Defendants then constructively discharged her.

On October 29, 1998, Plaintiff filed a complaint against the Defendants. The complaint has ten counts: (1) a sexual harassment and discrimination claim under the Pennsylvania Human Relations Act (PHRA) against both Defendants - Count I; (2) a sexual harassment and discrimination claim under Title VII against Pilot Air - Count II; (3) a constructive discharge claim under Title VII and PHRA against both Defendants - Count III; (4) a retaliation claim under Title VII and PHRA against both Defendants;

(5) an Equal Rights Amendment (ERA) claim against both Defendants - Count V; (6) an assault and battery claim against Phillips - Count VI; (7) an intentional infliction of emotional distress claim against both Defendants - Count VII; (8) a negligent infliction of emotional distress claim against both Defendants - Count VIII; (9) a negligent retention claim against Pilot Air - Count IX; and (10) a negligent supervision claim against Pilot Air - Count X. On December 14, 1998, Defendants filed a motion to dismiss Counts I and III-X.

II. STANDARD

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957). In other words, the plaintiff need only to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id.

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),\[1] this Court must "accept as true the facts alleged in

[1] Rule 12(b)(6) states as follows:

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the

(continued...)

the complaint and all reasonable inferences that can be drawn from them." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). The Court will only dismiss the complaint if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

III. DISCUSSION

A. Individual Liability Under Title VII and PHRA

Defendants first argue that Counts I, III, and IV should be dismissed as against Phillips because individuals cannot be liable under Title VII or the PHRA. The Court agrees that individuals cannot be liable under Title VII. See Dici v. Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996). Therefore, the Court dismisses Counts III and IV to the extent that these counts state a Title VII claim against Defendant Phillips.

Like Title VII, § 955(a) of the PHRA establishes liability for employers. See id. However, the PHRA goes further than Title VII to establish accomplice liability for individual employees who aid and abet a § 955(a) violation by their employer.

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[1](...continued)
following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6).

See 43 Pa. Cons. Stat. Ann. § 955(e) (Purdon Supp. 1997) (providing liability for employees who "aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice"). "[A] supervisory employee who engages in discriminatory conduct while acting in the scope of his employment shares the intent and purpose of the employer and may be held liable for aiding and abetting the employer in its unlawful conduct." Glickstein v. Neshaminy Sch. Dist., No.CIV.A.96-6236, 1997 WL 660636, at * 12 (E.D. Pa. Oct. 22, 1997) (citing Tyson v. CIGNA Corp., 918 F. Supp. 836, 841 (D.N.J. 1996), aff'd, 149 F.3d 1165 (3d Cir. 1998) (unpublished table opinion)). "Thus, a supervisor's failure to take action to prevent discrimination, even when it is the supervisory employee's own practices at issue, can make him or her liable for aiding and abetting the employer's insufficient remedial measures." Frye v. Robinson Alarm Co., No. CIV.A.97-0603, 1998 WL 57519, at *7 (E.D. Pa. Feb. 11, 1998) (citing Glickstein, 1997 WL 660636, at *11-13); see Wien v. Sun Co., Inc., No.CIV.A.95-7647, 1997 WL 772810, at *7 (E.D. Pa. Nov. 21, 1997).

In the present case, the Defendants contend that the Plaintiff failed to allege sufficient facts to support her claims of accomplice liability against Phillips. See Defs.' Mem. of Law in Support of Mot. to Dismiss at 7. This Court disagrees. Plaintiff alleges that she was executive secretary to Phillips on

occasion. See Pl.'s Compl. at ¶ 11. Plaintiff also alleges that, as Director of Human Resources, she reported directly to Phillips for several months. See id. at ¶ 12. Plaintiff further alleges that Phillips committed sexually harassing conduct, including sexually offensive comments and gestures. See id. at ¶ 16. Finally, Plaintiff alleges that Phillips failed to take action to prevent discrimination, even though it was his own practices at issue. See id. at ¶ 47. Under these allegations, Phillips may be liable for aiding and abetting the employer's insufficient remedial measures. See Frye, 1998 WL 57519, at *7. Accordingly, the Court will not dismiss Counts I, III, and IV on this ground.

B. Constructive Discharge

Defendants next argue that the Court should dismiss Count III, a constructive discharge claim under Title VII and PHRA against both Defendants, because the Plaintiff has not pled sufficient facts to support her claim of constructive discharge. More specifically, Defendants argue that "[P]laintiff has not resigned and does not allege that she . . . has resigned as a result of the alleged discrimination." Defs.' Mem. of Law in Support of Mot. to Dismiss at 8. The Court cannot agree at this stage of the proceedings.

In order to establish a constructive discharge, a plaintiff must show that "the employer knowingly permitted conditions of discrimination in employment so intolerable that a

reasonable person subject to them would resign." Goss v. Exxon Office Sys. Co., 747 F.2d 885, 888 (3d Cir. 1984). The Court must ask if a jury could ultimately decide that a reasonable person would be forced to quit. See id. Courts have found constructive discharge based upon a continuous pattern of discriminatory treatment over a period of years. See, e.g., Nolan v. Cleland, 686 F.2d 806, 813 (9th Cir. 1982).

The Court finds Plaintiff's allegations sufficient to survive a motion to dismiss. The Plaintiff alleges that she "has been subjected to constructive discharge by [D]efendants." See Pl.'s Compl. at ¶ 35. The Plaintiff also alleges that "[b]ecause of [D]efendants' sexual harassment, discrimination and retaliation, Plaintiff is not now and is not expected in the future to be able to return to work at Pilot." Id. In light of these allegations, the Court is unwilling to dismiss Plaintiff's constructive discharge claim at the motion to dismiss stage based solely upon Defendants' unsupported argument that Plaintiff has not in fact resigned from Pilot. Therefore, the Court denies the Defendants' motion to dismiss in this respect.

C. Punitive Damages Under PHRA

Defendants next move to dismiss Plaintiff's claim for punitive damages under the PHRA. In Hoy v. Angelone, 720 A.2d 745, 751 (Pa. 1998), the Supreme Court of Pennsylvania held that punitive damages were not available under the PHRA. See id.

Therefore, the Court grants Defendants' motion in this respect and dismisses Counts I, III, and IV to the extent that Plaintiff seeks punitive damages under the PHRA.

D. Plaintiff's Title VII and PHRA Retaliation Claims

The Defendants further move to dismiss Plaintiff retaliation claims under Title VII and PHRA. To establish a claim for retaliation under Title VII or the PHRA, a plaintiff must prove that: (1) he or she engaged in a protected activity; (2) the employer took adverse action against him or her subsequent to or contemporaneously with such activity; and (3) a causal link exists between his or her protected conduct and the employer's adverse action. See Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 201 (3d Cir. 1994). Defendants argue that the Court should dismiss the Plaintiff's retaliation claims for two reasons. First, Defendants contend that Plaintiff failed to allege a sufficient adverse employment action. Second, Defendants argue that there is no causal connection between Plaintiff's alleged protected activity and her alleged adverse employment action.

1. Adverse Employment Action

In June, 1998, the United States Supreme Court defined "an adverse employment action":

> A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities,

> or a decision causing a significant change in benefits. . . . A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury.

Burlington Indus. v. Ellerth, 118 S. Ct. 2257, 2268-69 (1998). Moreover, "[i]t follows that not everything that makes an employee unhappy qualifies as retaliation, for '[o]therwise, minor and even trivial employment actions that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit.'" Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996) (quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)). Thus, courts require that retaliatory conduct be serious and tangible enough to alter the employee's compensation, terms, conditions, or privileges of employment. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997).

In this case, the Defendants argue that the Plaintiff failed to allege sufficient facts to establish an adverse employment action in her retaliation claim. Specifically, Defendants contend that the Plaintiff only alleges a poor performance evaluation which is insufficient under case law to establish an adverse employment action. This Court disagrees. The Plaintiff alleges that the Defendants demoted her to a less important job, constructively discharged her, and gave her an unwarranted poor performance evaluation in retaliation for engaging in protected activity. See Pl.'s Compl. at ¶¶ 25, 27, 35, 44, &

47. While a poor evaluation may or may not be sufficient, the Court finds that these other allegations-- in addition to the alleged unwarranted poor evaluation-- are sufficient to state a retaliation claim at this time. Accordingly, the Court denies the Defendants' motion to dismiss the retaliation claims.

2. Causal Connection

The Defendants argue that "[t]here is also no evidence of a causal connection between [P]laintiff's alleged protected activity and her alleged adverse employment action." Defs.' Mem. of Law in Support of Mot. to Dismiss at 11. The Court finds that this argument is not proper at the motion to dismiss stage. In evaluating the Defendants' motion, this Court must accept the allegations in Plaintiff's complaint as true. See Markowitz, 906 F.2d at 103. The Plaintiff alleges that "Defendants' decisions to demote, give an unfair performance evaluation to, and constructively discharge plaintiff were motivated by and causally connected to the fact that she engaged in protected activities . . . ." Pl.'s Compl. at ¶ 66 (emphasis added). The Court must accept this allegation as true for now and, therefore, denies the Defendants' motion in this respect.

E. Intentional Infliction of Emotional Distress

The Defendants next move to dismiss Count VII of the Plaintiff's complaint, a claim for intentional infliction of

emotional distress, for two reasons. First, the Defendants contend that the exclusivity provision of the Pennsylvania Worker's Compensation Act (WCA) bars a separate claim for intentional infliction of emotional distress. Second, the Defendants argue that the Plaintiff's allegations fail to state the necessary level of outrageous conduct required for sexual harassment in the workplace under Pennsylvania law.

1. Pennsylvania Workmen's Compensation Act

The WCA provides that worker's compensation is the exclusive remedy for injuries arising in the course of a worker's employment. See 77 Pa. Cons. Stat. Ann. § 481(a) (Purdon 1997). The WCA excepts from its preemptive scope employee injuries caused by the intentional conduct of third parties for reasons personal to the tortfeasor and not directed against him or her as an employee or because of his or her employment. See id. § 411(1).

The courts are split on the propriety of allowing intentional infliction of emotional distress claims for sexual harassment on the job. On the one hand, some courts allow such claims where the injury arose from harassment "personal in nature and not part of the proper employer-employee relationship." Hoy v. Angelone, 691 A.2d 476, 482 (Pa. Super. Ct. 1997), aff'd, 720 A.2d 745 (Pa. 1998); see also McGrenaghan v. St. Denis Sch., 979 F. Supp. 323, 329 (E.D. Pa. 1997); Lazarz v. Bush Wellman, Inc., 857 F. Supp. 417, 423 (E.D. Pa. 1994); Rodgers v. Prudential Ins. Co.

of Am., 803 F. Supp. 1024, 1029 (M.D. Pa. 1992), aff'd, 998 F.2d 1004 (3d Cir. 1993) (unpublished table opinion); Schweitzer v. Rockwell Int'l, 586 A.2d 383, 391 (Pa. Super. Ct. 1990). On the other hand, some courts have found preemption in similar circumstances. See Hicks v. Arthur, 843 F. Supp. 949, 958 (E.D. Pa. 1994) (finding that harassment of a group of black employees did not stem from "personal animosity" and any black would have been discriminated against, so claim was preempted); Gilmore v. Manpower, Inc., 789 F. Supp. 197, 198 (W.D. Pa. 1992).

In Durham Life Ins. Co. v. Evans, 166 F.3d 139, 160 (3d Cir. 1999), the Third Circuit suggested that the WCA bars an intentional infliction of emotional distress claim where a co-employee harassed the plaintiff based upon a work-related personal animosity. See id. The Third Circuit stated that:

> Sexual harassment is a well-recognized workplace problem, the kind of thing employers must be prepared to combat. Because it is like other workplace hazards, we suspect that Pennsylvania would find [intentional infliction of emotional distress] claims based on this kind of harassment to be preempted. But we cannot be sure, and we express no opinion as to whether an [intentional infliction of emotional distress] claim for harassment more disconnected from the work situation would be preempted, for example where a supervisor sexually assaulted an employee or stalked her outside of work.

Id. at 160 n.16. Thus, in Durham, the Third Circuit refused to comment on the case law which holds that the WCA does not preempt intentional infliction of emotional distress claims where the

sexual harassment is personal in nature and not part of the proper employer-employee relationship. See id.

This Court concludes that the WCA does not preempt Plaintiff's intentional infliction of emotional distress claim. As noted above, many courts in this district have found that the WCA does not preempt intentional infliction of emotional distress claims where the sexual harassment is personal in nature. In this case, Plaintiff alleges that Phillips sexually harassed her in and out of the workplace. See Pl.'s Compl. at ¶ 16. Therefore, the complaint may be reasonably read to include harassment of a personal nature and thus within the judicial exception of the WCA. Furthermore, neither the Third Circuit nor the Pennsylvania Supreme Court have ruled on this issue. Accordingly, the Court denies the Defendants' motion in this regard.

2. Required Level of Outrageousness

The Pennsylvania courts recognize the tort of intentional infliction of emotional distress. See Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 190, 527 A.2d 988, 991 (1987). To state a cognizable claim, however, the conduct alleged "must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988). In the employment context, it is extremely rare that ordinary sexual

harassment will rise to the level of outrageousness required by Pennsylvania law. Id. The Third Circuit also noted that:

> [A]s a general rule, sexual harassment alone does not rise to the level of outrageousness necessary to make out a cause of action for intentional infliction of emotional distress. As we noted in Cox, 861 F.2d at 395-96, "the only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee." See, e.g., Bowersox v. P.H. Glatfelter Co., 677 F. Supp. 307, 311 (M.D. Pa. 1988). The extra factor that is generally required is retaliation for turning down sexual propositions.

Andrews v. City of Phila., 895 F.2d 1469, 1486-87 (3d Cir. 1990); see also Kinally v. Bell of Pa., 748 F. Supp. 1136, 1144-45 (E.D. Pa. 1990); Stilley v. University of Pittsburgh, 968 F. Supp. 252, 260 (W.D. Pa. 1996).

In this case, the Court finds that the Plaintiff's complaint states the necessary level of outrageous conduct required for sexual harassment in the workplace under Pennsylvania law. See Andrews, 895 F.2d at 1487. Plaintiff alleges that Phillips sexually propositioned her. See Pl.'s Compl. at ¶ 16. Moreover, Plaintiff alleged that the Defendants retaliated against her for refusal of Phillips' sexual propositions. See id. at ¶16, 44; see also Andrews, 895 F.2d at 1487. Therefore, under Andrews, the Court finds sufficient facts to state a claim for intentional infliction of emotional distress due to sexual harassment in the

workplace and denies the Defendants' motion in this respect. See id.

F. Plaintiff's State Law Claims

Finally, Defendants argue that this Court should decline the exercise of supplemental jurisdiction over Plaintiff's remaining state law claims for two reasons. First, Defendants contend that these claims present a novel and complex issue of state law. Second, Defendants contend that while Plaintiff is entitled to a jury trial under her state law claims, she is not entitled to a jury trial under her Title VII claims. This Court does not agree with either argument.

Section 1367 states that the federal courts "shall have supplemental jurisdiction" over claims which are "part of the same case or controversy" as a claim over which the court exercises original jurisdiction. See 28 U.S.C. § 1367(a) (1994). Thus, in order to properly exercise supplemental jurisdiction, there are three requirements. First, the "'federal claim must have substance sufficient to confer subject matter jurisdiction on the court.'" Lyon v. Whisman, 45 F.3d 758, 760 (3d Cir. 1995) (quoting Gibbs, 383 U.S. at 725)). Second, the state and federal claims must derive from a common nucleus of operative fact. See id. Third and finally, Plaintiff must ordinarily expect to try all claims in one judicial proceeding. See Lyon, 45 F.3d at 760.

Here, Plaintiff satisfies all of three requirements for supplemental jurisdiction. The Title VII claim confers subject matter jurisdiction to this Court. All of Plaintiff's claims are derived from a common nucleus of operative fact. Finally, Plaintiff should have expected to try her Title VII claims together because she would save on litigation expenses.

Nevertheless, Section 1367(c) provides that a district court may, in its discretion, decline to exercise jurisdiction if any of four conditions are met. These four conditions are:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Id. § 1367(c). The Court may properly decline to exercise supplemental jurisdiction and dismiss the state claims if any one of these conditions apply. See Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1284 (3d Cir. 1993). In making its determination, the district court should take into account generally accepted principles of "judicial economy, convenience, and fairness to the litigants." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

In this case, Defendants urge this Court to exercise its discretion and deny supplemental jurisdiction because Plaintiff's state law claims present a novel and complex state law issue. The Court disagrees and retains jurisdiction over Plaintiff's state law claims. Plaintiff's state law claims do not present a novel or complex state law issue. Beside conclusory statements, the Defendants do not state how Plaintiff's various negligence and intentional tort claims present novel and complex issues to this Court. Additionally, the Plaintiff would have to expend a substantial amount of time, effort, and money to prepare a claim that could just as easily be argued in federal court. See Gibbs, 383 U.S. at 726 (noting that the district court should take into account generally accepted principles of "judicial economy, convenience, and fairness to the litigants" in making its determination of whether to exercise or decline supplemental jurisdiction). Therefore, this Court rejects Defendants' invitation to decline supplemental jurisdiction on this ground.

The Court also rejects the Defendants' argument that it should decline jurisdiction over her state law claims because the state law claims require a jury trial while her Title VII claims do not. Under Title VII, a Plaintiff is entitled to a jury trial if he or she seeks compensatory and punitive damages. See 42 U.S.C. § 1981a(c)(1) (1994). Thus, the Court denies the Defendants' motion in this regard.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEPKE J. WILS	:	CIVIL ACTION
	:	
v.	:	
	:	
RICHARD G. PHILLIPS and PILOT AIR FREIGHT, INC.	:	NO. 98-5752

O R D E R

AND NOW, this 8th day of March, 1999, upon consideration of the Defendants Richard Philips and Pilot Air Freight, Inc.'s Motion Under Fed. R. Civ. 12(b)(6) to Dismiss Counts I and III through X of the Complaint, IT IS HEREBY ORDERED that the Defendants' Motions is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that:

(1) Counts III and IV are **DISMISSED** to the extent that these counts state a Title VII claim against Defendant Richard Phillips; and

(2) Counts I, III, and IV of Plaintiff's complaint are **DISMISSED** to the extent that these counts seek punitive damages under the PHRA.

BY THE COURT:

_____
HERBERT J. HUTTON, J.